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WONG SEE YAW & ANOR v. BRIGHT PACKAGING INDUSTRY BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI JC
[CIVIL APPEAL NO: 12BNCC-35-07-2015]
15 APRIL 2016

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COMPANY LAW: *Director – Fees – Discovery that ex-directors received unauthorised payments of director's fees – Claim for return of unauthorised sum received by ex-directors – Allegation that sums received were travelling allowances – Whether memorandum and articles of association of company provided for travelling allowances to be fixed sum – Whether there was approval by shareholders – Whether approval required*

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The appellants were ex-directors of the respondent. The respondent discovered that the first and second appellants received unauthorised payments of director's fees amounting to RM260,000 and RM15,300 ('the said sums'), respectively. The respondent initiated an action at the Sessions Court against the appellants for the return of the said sums. Out of the RM260,000 claimed from the first appellant, the relevant payment vouchers stated that a total of RM108,000 was paid as director's fees while the remaining RM152,000 was, based on payment vouchers, categorised as travelling allowances. Similarly, in respect of the RM15,300 claimed against the second appellant, a total sum of RM9,000 was categorised by the relevant payment vouchers as director's fees while the remaining RM6,300 was labelled as travelling allowances. The Sessions Court Judge ('the SCJ') held in favour of the respondent and found that the said sums were director's fees and not travelling allowances as nowhere in the memorandum and articles of the association did it provide for travelling allowances to be a fixed sum. If they were genuinely travelling allowances, there was failure to secure the shareholders' approval. Hence, the present appeal. The issues that arose for the court's adjudication were (i) whether the payments of RM108,000 and RM9,000 to the first and second appellants, respectively, were director's fees; and (ii) whether the payments described as travelling allowances of RM152,000 and RM6300, respectively, were director's fees or in any event, required the approval of the shareholders of the respondent.

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H **Held (dismissing appeal; affirming decision of Sessions Court):**

(1) It was the first appellant himself who signed and approved the relevant payment vouchers as director's fees. The first appellant's act of getting his own signature and approval for payments intended to be made for his own direct benefit did not reflect a good sound control and governance system in place at the institution of the respondent. Surely an exception could be made where, for the first appellant, the signature could instead be arranged to be given by the Chairman, subject to

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confirmation that the papers were in order. As such, the contention that the payments of RM108,000 and RM9,000 to the first and second appellants, respectively, was for travelling allowances and not for director's fees, despite the description on the vouchers, was therefore untenable and could not be accepted. Being director's fees, the sums should have been tabled to the shareholders at a general meeting for approval. (paras 24-26)

(2) No evidence such as proof of receipt of travels was produced by the appellants. Neither did the first appellant produce his passport to corroborate his claims of frequent travelling for the respondent even though he agreed to make it available. Furthermore, there was absolutely no evidence of a Board resolution or minutes which set out the Board remuneration policy for the respondent. Payment of travelling allowances, assuming they indeed were so, could at any rate be lawfully made to directors only if approved by the shareholders or authorised under the articles. In this case, neither could be shown to be applicable *vis-a-vis* the said travelling allowances, such payments could not be construed as being other than not valid. The claim for recovery by the respondent, as the paying company, must therefore succeed. (paras 34, 35 & 44)

Case(s) referred to:

Bahamas International Trust Co Ltd v. Threadgold [1974] 1 WLR 1514 ***(refd)***
BP (Sabah) Sdn Bhd v. Syarikat Jubrin Enterprise & Ors [1998] 5 CLJ 104 HC ***(foll)***
Guinness plc v. Saunders [1990] 2 AC 663 ***(refd)***
Hospital Products Ltd v. United States Surgical Corp [1984] 156 CLR 41 ***(refd)***
Howard Smith Ltd v. Ampol Petroleum Ltd [1974] AC 821 ***(refd)***
Hutton v. West Cork Railway Co (1883) 23 Ch 654 ***(refd)***
In Re George Newman & Co [1895] 1 Ch 674 ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Mahesan v. Malaysian Government Officers Co-Operative Housing Society Ltd [1974] 1 LNS 83 FC ***(refd)***
Mc Millan v. Guest [1942] AC 561 ***(refd)***
Murugan v. Lew Chu Cheong [1980] 1 LNS 49 FC ***(refd)***
Newtherapeutics Ltd v. Katz [1991] Ch 226 ***(refd)***
NJV Menon v. The Great Eastern Life Assurance Company Ltd [2004] 3 CLJ 96 CA ***(refd)***
Re Richmond Gate Property Co Ltd [1964] 3 All ER 936 ***(refd)***
Regal (Hastings) Ltd v. Gulliver [1967] 2 AC 134 ***(refd)***
Rugber Kaur Ajaib Singh v. Ho Shee Fun & Anor [2011] 5 CLJ 159 CA ***(refd)***
Shanmugam Paramsothy v. Thiagarajah Pooinpatarsan & Ors [2001] 8 CLJ 683 HC ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***
Yahaya Mohamad v. Chin Tuan Nam [1975] 1 LNS 195 PC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 33, 131B, 132(1), (2), Fourth Schedule reg. 70
Courts of Judicature Act 1964, s. 29
Rules of Court 2012, O. 55 r. 2

A *For the appellants - Joseph Yeo; M/s Joseph Yeo*
For the respondent - YL Choong; M/s YL Chong & Assocs

[Editor's note: Appeal from Sessions Court, Kuala Lumpur; Suit No: B52NCC-461-06-2014 (affirmed).]

B *Reported by Najib Tamby*

JUDGMENT

Mohd Nazlan Ghazali JC:

C **Introduction**

[1] This is the appellants' (as the first and second defendants in the court below) appeal against the judgment of the Kuala Lumpur Sessions Court delivered on 30 June 2015 against them. After hearing the appeal, I gave my decision dismissing the same, and this judgment, which contains the full D reasons for my decision, focuses on that aspect of company law which governs payments of directors' remuneration.

Key Backgrounds Facts

[2] The respondent is a public listed company and is involved in the E manufacturing of aluminium foil packaging materials. On 8 June 2005, the first defendant/appellant was appointed as Managing Director of the respondent/plaintiff and on 3 April 2008, the second defendant/appellant was appointed as a director of the respondent/plaintiff.

[3] The claim against the first appellant was for the return to the F respondent company the sum of RM260,000 being what was said to be an unauthorised payment of director's fees and that against the second appellant was similarly for the return to the respondent the sum of RM15,300 also being the payment of director's fees contended to be unauthorised.

[4] The claim by the respondent against the third defendant at the Sessions G Court was withdrawn as he had refunded the relevant sum of money to the respondent, and a judgment in default of appearance had been obtained against the fourth defendant. In any case, both did not file an appeal against the relevant decisions.

[5] It was not disputed that for a period of 12 months from September H 2011 to August 2012, the first appellant received director's fees in the sum of RM576,000; and the second appellant received RM42,000, in all cases without the approval of the respondent's shareholders in a general meeting.

[6] On 21 February 2013, the respondent convened an annual general meeting ("AGM") followed by an extraordinary general meeting ("EGM") I for the year 2012, and the following, which are relevant for present purposes, took place:

(a) At the AGM, the shareholders rejected both the resolutions to approve the payment of directors' fees (of RM576,000 and RM42,000 to the first and second appellants, respectively) and to re-elect the second appellant as a director;

(b) At the EGM, the shareholders also resolved to remove the first appellant from his position as a director.

[7] The first and second appellants subsequently thus duly returned the RM576,000 and RM42,000 to the respondent respectively, and ceased to be directors of the respondent.

[8] In the same year of 2013, it came to the knowledge of the respondent that for a period of about four months, earlier, from 5 October 2012 to 6 February 2013 that the first appellant had received a total sum of RM260,000 and the second appellant, RM15,300 in directors' remuneration which had also not been approved by the shareholders.

[9] The respondent's solicitors then issued notices of demand on 28 February 2014, to the first and second appellants and demanded for the return of the said sums of RM260,000 and RM15,300 respectively. This was following the rejection of such payment by the AGM of the respondent on 24 February 2014. Given their failure to abide by the demand, the respondent commenced legal action on 24 June 2014 against the first and second appellants at the Sessions Court, and following the completion of a full trial, the Sessions Court delivered judgment against the first and second appellants on 30 June 2015, allowing the plaintiff/respondent's claim for RM260,000 and RM15,300 plus interests and costs against the first and second defendants/appellants respectively. Hence this appeal.

Summary Of Contentions Of Parties At Trial

[10] The essence of the respondent's claims is quite straightforward. The respondent argued that the sum of RM260,000 was an unauthorised payment of director's fees to the first appellant as it did not obtain shareholders' approval, more so as the shareholders at the AGM on 24 February 2014 had actually rejected the resolution to approve the payment of director's remuneration for financial year ended 2013. The payment of RM15,300 to the second appellant was similarly challenged on the same basis.

[11] In reply, the appellants submitted that the said sums of RM260,000 and RM15,300 were for "travelling allowances", and not directors' fees, and therefore did not require shareholders' approval. Furthermore, such payments had been ratified by the respondent's own Board of Directors and the Board Remuneration Committee. The decision to pay such travelling allowances was a matter for the management and would not be subject to or require the approval of the shareholders of the respondent.

[12] The issues to be determined therefore revolved around the legal nature of the said sums (RM260,000 and RM15,300); whether they were directors' fees or "travelling allowances" and required shareholders' approval and in any event, whether they ought to be returned to the respondent as the shareholders had on 24 February 2014 expressly rejected the resolution for the approval of the said sums.

[13] It is an important piece of evidence to be noted that out of the RM260,000 claimed from the first appellant by the respondent, the relevant payment vouchers state that a total sum of RM108,000 was paid as "director's fees" for the months of September, October and November 2012. The remaining RM152,000 was, based on payment vouchers, said to be differently categorised as "travelling allowances" for September 2012 until January 2013. Similarly, in respect of the RM15,300 claimed against the second appellant, a total sum of RM9,000 was categorised by the relevant payment vouchers as "director's fees" for September, October and November 2012. The remaining RM6,300 was labelled as "travelling allowances" as paid for the months of October 2012 until January 2013. The breakdown of the amount paid based on what was stated in the payment vouchers in respect of both appellants is important to be noted and may be summarised in the following manner:

(a) The first appellant

No.	Month	Director's Fees	"Travelling Allowances"	Total
1.	September 2012	36,000	20,000	56,000
2.	October 2012	36,000	20,000	56,000
3.	November 2012	36,000	20,000	56,000
4.	December 2012	-	56,000	56,000
5.	January 2013	-	36,000	36,000
	Total	108,000	152,000	260,000

(b) The second appellant

No.	Month	Director's Fees	"Travelling Allowances"	Total
1.	September 2012	3,000	-	3,000
2.	October 2012	3,000	300	3,300
3.	November 2012	3,000	-	3,000
4.	December 2012	-	3,000	3,000
5.	January 2013	-	3,000	3,000
	Total	9,000	6,300	15,300

Decision Of Sessions Court

[14] The learned Sessions Court Judge, in giving judgment in favour of the respondent held that the sums (of RM108,000 and RM9,000 paid to the first and second appellants respectively) categorised as "director's fees" were indeed directors' fees. In respect of the payment (of RM152,000 and RM6,300 to the first and second appellants respectively) described as "travelling allowances" in the payment vouchers, the Sessions Court ruled that there were instead directors' fees, and not travelling allowances because nowhere in the Memorandum & Articles of Association ("M&A") of the respondent did it provide for travelling allowances to be a fixed sum, and that if these were genuinely travelling allowances, there was failure to secure shareholders' approval. In any event, these travelling allowances were not in the nature of reimbursable claims supported by proof of receipts.

Summary Of Contentions Of The Appellants

[15] The appellants essentially repeat their arguments at trial. The first is that the amount of RM108,000 paid to the first appellant and RM9,000 to the second appellant, both of which stated as "director's fees" in the payment vouchers is a mistake and that the payments were actually for "travelling allowances". The only witnesses for the appellants at trial who were the first and second appellants themselves, as DW1 and DW2 did not agree that such payments were for directors' fees.

[16] Secondly, the payments for the remainder RM152,000 and RM6,300 to the appellants were correctly described and labelled as "travelling allowances". The appellants submitted that the Sessions Court's decision that the purported allowances could not be allowed because they were not supported by proof of receipts was in error because such travelling allowances were argued to have been paid not on the basis of art. 116 on determination of directors' fees nor art. 117 on director's entitlement to reimbursable expenses, but instead effected pursuant to the authority of the Board of Directors for services rendered and not subject to the approval of the shareholders who could not and should not interfere with the decision of the Board. It is, so the appellants contended, irrelevant whether the said "travelling allowances" were made by way of a fixed sum or otherwise. Equally importantly, the appellants submitted that there is nothing in the articles of the respondent which prohibits the Board or its Remuneration Committee from approving such "travelling allowances".

The Analysis & Findings By This Court

Nature Of Appellate Function

[17] In hearing this appeal, whilst mindful that under s. 29 of the Courts of Judicature Act 1964 and O. 55 r. 2 of the Rules of Court 2012, all civil appeals are to be by way of rehearing, I am reminded of the essence of the role and function of this court as established by case law authorities and have therefore proceeded approaching the same accordingly. In particular I refer

to the decision of the Court of Appeal in the case of *Rugber Kaur a/p Ajaib Singh v. Ho Shee Fun & Anor* [2011] 5 CLJ 159; [2011] 2 PIR [25] where it was stated as follows:

> It is the duty of an appeal court, if satisfied or convinced that the trial judge had acted upon principles of law that were wrong, had misapprehended the facts or had made a wholly erroneous conclusion, to reverse the decision (*Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323; *Rasidin b Partorjo v. Frederick Kiai* [1976] 1 LNS 123). Lindley MR in *Coghlan v. Cumberland* [1898] 1 Ch 704 had occasion to say:
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> > Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shirking from overruling it if on a full consideration the court comes to the conclusion that the judgment is wrong.

[18] The trite principle of law that an appellate court should be slow to interfere with the findings of fact of a trial judge cannot therefore be emphasised enough, and in my view decidedly applicable to the instant case, especially since the trial judge had the advantage of hearing and observing the demeanour of the witnesses before arriving at her conclusion. (see for example, the earlier Privy Council case of *Yahaya Mohamad v. Chin Tuan Nam* [1975] 1 LNS 195; [1975] 2 MLJ 117, and the Federal Court's decision in *Murugan v. Lew Chu Cheong* [1980] 1 LNS 49; [1980] 2 MLJ 139).

[19] The Court of Appeal in *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395 has so clearly stated the following often quoted rule, similarly applicable to the instant case:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[20] Further, Gopal Sri Ram JCA speaking for the Court of Appeal in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 referred to the need to assess the evidence and to weigh them and for good reasons accept or reject them accordingly, as follows:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial

> appreciation of evidence involves. A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same.

Construction Of Documents

[21] It is also worthy of emphasis for it is of relevance in this instant case that common law has established a number of important principles in the interpretation of contracts, one of which, especially pertinent for present purposes is that the construction of contract, which includes articles of association of a company (being a form of a statutory contract of a special nature under s. 33 of the Companies Act 1965) is a question of law for determination by the court and not by witnesses through their evidence. In *Bahamas International Trust Co Ltd v. Threadgold* [1974] 1 WLR 1514, Lord Diplock stated the following:

> In a case which turns, as this one does, on the construction to be given to a written document, a court called on to construe the document in the absence of any claim to rectification, cannot be bound by any concession made by any of the parties as to what its language means. That is so even in the court before which the concession is made; a *fortiori* in the court to which an appeal from the judgment of the court is brought. The reason is that the construction of a written document is a question of law. It is for the judge to decide for himself what the law is, not to accept it from any or even all the parties to the suit; having so decided it is his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it were erroneous.

[22] This has since been emphatically followed in Malaysian cases, such as in the Court of Appeal's decision in *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96; [2004] 4 AMR 164; [2004] 3 MLJ 38.

Issue 1: Whether The Payments Of RM108,000 To The First Appellant And RM9,000 To The Second Appellant Were For "Directors' Fees"

[23] I agree with the submission of the appellants that the evidence given by the first appellant during trial could not be construed as admitting that these payments were indeed for directors' fees. The first appellant claimed

it must have been a mistake; but the second appellant was more definitive in her testimony confirming the amount of payment was for directors' fees and did not offer a denial during cross-examination when referred to by counsel for the respondent on each of the RM3,000 payment described as "director's fees". Furthermore, the appellants' argument that if the payments were for directors' fees, these would have been presented for shareholders' approval could also in my view be a convenient self-serving statement. It is undisputed by the terms of art. 116 of the M&A of the respondent that payment of directors' fees must be approved by an ordinary resolution of the respondent, that is, to be approved by the shareholders of the company in a general meeting. Article 116 states the following:

> Directors' fees and out of pocket expenses
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> 116. **The fees of the directors shall be such fixed sum as shall from time to time be determined by an ordinary resolution of the Company** and shall (unless such resolution otherwise provided) be divisible among the directors as they may agree, or, failing agreement, equally, except that any director who shall hold office or part of the period in respect of which such fees are payable shall be entitled only to rank in such division for a proportion of the fees related to the period during which he has held office ... (emphasis added)

[24] Crucially, it was the first appellant himself who signed and approved the relevant payment vouchers as directors' fees. The first appellant did not deny it was his signatures on those vouchers when questioned during cross-examination. As such, the well-established Federal Court case of *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229 on the importance and value of contemporaneous acts and documents would be applicable. Chang Min Tat FJ stated the point in the following manner:

> Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. *For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings*. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity. It may be advantageous at this stage to recall the words of Lord Greene M.R. in *Yuill v. Yuill* [1945] P 15 at pages 19-20:
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> > We were reminded of certain well-known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial judge has been based in whole or in part on his opinion of the demeanour of witnesses. It can, of

> course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction. It has never been laid down by the House of Lords that an appellate court has no power to take this course. Puisne judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness. The most experienced judge may, *albeit* rarely, be deceived by a clever liar, or led to form an unfavourable opinion of an honest witness, and may express his view that his demeanour was excellent or bad as the case may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge. I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value.
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> (emphasis added).

[25] I cannot therefore but agree with the finding made by the trial judge that the testimony given by the first appellant on this point is plainly inconsistent with, if not diametrically in direct opposition to his own conduct *vis-à-vis* the contemporaneous documents concerning his own signature which signified approval of the vouchers as directors' fees. I am also compelled to make the observation that the first appellant getting his own signature and approval for payments intended to be made for his own direct benefit too does not reflect a sound control and governance system in place at the institution of the respondent. Surely an exception can be made where for the Managing Director, the signature could instead be arranged to be given by the Chairman subject to confirmation that the papers were in order.

[26] As such, the appellants' contention that the payments of RM108,000 (to the first appellant) and RM9,000 (to the second appellant) was for travelling allowances and not for directors' fees despite the description on the vouchers is therefore untenable and cannot be accepted. Being directors' fees, the sums should have been tabled to the shareholders at a general meeting for approval.

Law On Directors' Remuneration

[27] It is apposite that I now state the law applicable to the matter in contention. It is a well-established common law rule in company law which is elementary and uncomplicated, but does not appear to be fully understood in practice by corporations, including even public listed companies. It is this.

Directors of a company have no authority to expend on the funds of the company to pay themselves or any one of their number, unless they are authorised for such purpose by the company's constitution in its M&A or the payment is approved by the members of the company (see *In Re George Newman And Co* [1895] 1 Ch 674). Bowen LJ in *Hutton v. West Cork Railway Co* (1883) 23 Ch 654 stated as follows:

> A director is not a servant [i.e. employee]. He is a person who is doing business for the company, but not upon ordinary terms. **It is not implied from the mere fact that he is a director that he is to have right to be paid for it**. In some companies ... there is a special provision for the way in which the directors should be paid; in others there is not. If there is a special provision for the way in which they are to be paid, you must look to the special provision to see how to deal with it. **But if there is no special provision their payment is in the nature of a gratuity**.
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> (emphasis added)

[28] A director of a company therefore does not has a right to be remunerated as of right by virtue of his office except as provided by its constitution or approved by its shareholders. In *Re Richmond Gate Property Co Ltd* [1964] 3 All ER 936, it was held that in the absence of any resolution concerning the amount of directors' remuneration passed pursuant to the articles in general meeting prior to the liquidation of the company, the directors were thus not entitled to any remuneration. In *Guinness plc v. Saunders* [1990] 2 AC 663, the articles provided that the remuneration of the director performing services for the company outside the scope of the ordinary duties of a director was to be determined by the company's Board as a whole. The House of Lords held that as no determination had been made by the Board, the relevant director was not entitled to any remuneration. The director in question had been given special remuneration by a committee of the Board, an act which the committee had no authority to perform. Accordingly the director had to return the remuneration. Even his claim for *quantum meruit* was refused since in that case the parties could be said to have agreed how remuneration was to be decided, but instead not followed.

[29] Neither is the fact that a person is a director of a company in itself makes that person an employee, which would otherwise entitle him to remuneration as an employee.

[30] But most importantly, this rule on directors' remuneration emanates from the principle that a director stands in a fiduciary relationship *vis-à-vis* the company he serves. Lord Porter in *Regal (Hastings) Ltd v. Gulliver* [1967] 2 AC 134 had this to say:

> Directors, no doubt, are not trustees, but they occupy a fiduciary position towards the company whose board they form.

[31] In *Hospital Products Ltd v. United States Surgical Corp* [1984] 156 CLR 41, Mason J said thus:

> ... the fiduciary's duty may be more accurately expressed by saying that he is under an obligation not to promote his personal interest by making or pursuing a gain in circumstances in which there is a conflict or a real or substantial possibility of a conflict between his personal interests and those of the persons whom he is bound to protect.

[32] A number of facets to the requirements governing the discharge of the role of a director as a fiduciary is enacted in the Companies Act 1965, chief amongst which is the duty to act in good faith in the best interest of the company under s. 132(1) and the prohibition against improper use of company's property, position, corporate opportunity or competing with the company under s. 132(2). Directors deciding to remunerate themselves in the absence of any authorisation by general meeting or any provision in the articles would clearly be infringing their role as fiduciaries and violate these statutory requirements, risking the penalty of imprisonment upon conviction, and being liable to the return of the secret profits or damages (see for instance the Privy Council's decision in *Mahesan v. Malaysian Government Officers Co-Operative Housing Society Ltd* [1974] 1 LNS 83; [1978] 1 MLJ 149). The clearest pronouncement by the local courts on this point yet may be found in the judgment of Raus J (as His Lordship then was) in the case of *Shanmugam Paramsothy v. Thiagarajah Pooinpatarsan & Ors* [2001] 8 CLJ 683; [2004] 5 MLJ 31, where His Lordship ruled most instructively as follows:

> ... directors have no right to be paid for their services, and cannot pay themselves or each other or to make presents to themselves out of the company's assets, unless authorised to do so by the instrument which regulates the company or by the shareholders at a properly convened meeting.

The principles of law governing payments by companies of remuneration such as fees, allowances, and other benefits to directors are therefore free from any ambiguity.

Issue 2: Whether The Payments Described As "Travelling Allowances" Of RM152,000 To The First Appellant And RM6,300 To The Second Appellant Were Directors Fees Or In Any Event Required The Approval Of The Shareholders Of The Respondent

[33] The two key provisions in the M&A of the respondent for present purposes are arts. 116 and 117. Article 116, as stated above concerns directors' fees which payment is stipulated as requiring shareholders' approval. The relevant parts of art. 117 read as follows:

> The directors shall be entitled to be reimbursed for all travelling or such reasonable expenses as may be incurred in attending and returning from meetings of the directors or of any committee of the directors or general meetings or otherwise howsoever in or about the business of the Company in the course of the performance of their duties as directors.

[34] I do not consider the trial judge's finding that the said "travelling allowances" were in truth directors' fees to be unsubstantiated. Article 116 refers to directors' fees to be in a nature of fixed sum. The "travelling allowances" in the instant case were indeed made by way of a fixed sum, which in itself is inconsistent with the nature of reimbursable expenses incurred and capable of being claimed by directors under art. 117 which certainly cannot be the same fixed amount month in month out. No evidence such as proof of receipt of travels was produced by the appellants. Neither did the first appellant produce his passport to corroborate his claims of frequent travelling for the respondent even though he agreed to make it available. The first appellant even admitted that there were no provisions in the M&A of the respondent which provide for the payment of "travelling allowances". The fact that the vouchers were described as "travelling allowances" is in my view not necessarily determinative of the nature of the document. Thus I agree that the case of *BP (Sabah) Sdn Bhd v. Syarikat Jubrin Enterprise & Ors* [1998] 5 CLJ 104; [1998] 4 MLJ 715 would apply to the situation at hand. Richard Malanjum J (as His Lordship then was) held, among others, the following:

> to determine the true construction of the letter, the substance and the surrounding circumstances must be looked at and not just the label attached to the document. It made reference to assigning all rights, title and interest in the contract payment to UOB, and the contract referred to was the contract with JKR. The letter further showed a complete surrender of the proceeds arising out of the contract. Thus, there was no merit in the contention that there was only a part assignment. In respect of the contention that the word 'absolutely' was not used, the failure to invoke such a word did not make much difference. It is the overall tenor of the document that should be taken into account. To agree with the contention would make the labelling of a document crucial and would be contrary to the rule in construing a document; ...

[35] Most crucially, and this was not touched on at trial nor in submissions by counsel in this appeal, there is absolutely no evidence of a Board resolution or minutes which set out the Board remuneration policy for the respondent. Instead the Board only ratified such specific payments of "travelling allowances". One would have thought that the various entitlements and benefits of the directors would have been well documented and validly approved in earlier meetings of the Board. But this is not to suggest that the existence of evidence of a Board approved policy authorising payments of travelling allowances would have settled the issue in favour of the appellants. Yet this is the crux of the case of the appellants for the Board did approve, *via* ratification, and that this was properly within the powers of the Board.

[36] As highlighted earlier, the payments of "travelling allowances" are contended by the appellants to be premised neither on art. 116 nor art. 117 but purely a matter within the purview of the Board of Directors who did

ratify the same. Thus the absence of proof of receipts to claim reimbursed expenses is inconsequential for payments of travelling allowances are not made in pursuance of art. 117. There are two aspects to this important submission by the appellants.

[37] The first aspect is that there is a distinction in law in payments made in connection with the office of a Director, such as director's fees, and those not attributed to the recipient being a member of the Board of the paying company. A common example would be that the salary and benefits of a director who is additionally appointed as an executive such as a Managing Director or CEO with a seat on the Board are not typically subject to the approval of the shareholders but entirely for the Board to decide on. It was thus asserted that the payment of travelling allowances which had been given to the first appellant was not due to his office as a director but instead in his capacity as the MD during the material time, as supported by his letter of appointment.

[38] I find this argument misconceived. It is true that being a director of a company is commonly construed as holding an office rather than being an employee (*Mc Millan v. Guest* [1942] AC 561), and the same applies to being a Managing Director whereby an employee serves under a contract of service, whereas the appointment of a person as a director of a company does not in itself form any contract between the director and the company (*Newtherapeutics Ltd v. Katz* [1991] Ch 226). Nevertheless, for present purposes, even if assuming that the distinction of the different roles of an individual as a director and an executive or employee can be easily made, it does not in any event apply to the facts of the instant case. This is because firstly, as I have highlighted, apart from the ratification of specific payments of "travelling allowances", there is no evidence of a Board approved policy on entitlements such as "travelling allowances" to directors in the first place. Secondly, the letter of appointment of the first appellant as the MD did not say he was entitled to payment of travelling allowances, other than stating he could claim expenditure for matters such as travelling and accommodation in the course of his duties performed on behalf of the respondent. Thirdly, the argument that the travelling allowances were not intended for the first appellant *qua* director cannot be applied in respect of the second appellant since her role was purely as a non-executive director (and not also an employee) but yet she was still paid travelling allowances. This in my view pretty much demolished the contention of the appellants. As if this challenge, palpably untenable as it is, is still not enough, it was also argued by the appellants that the travelling allowances were paid in fixed sum as estimates on travels would suffice without the need to make a claim, let alone for proof of receipt; for all this would be entirely for the Board (not the shareholders) to regulate. At the risk of being repetitive, apart from the absence of a Board resolution to support this assertion, I find this, if true, to

be disingenuous for being a convenient afterthought bereft of evidence, and at worst reaffirming a serious disregard for even a basic governance standards at the respondent company.

[39] The second aspect of the argument of the appellants is that travelling allowances are within the jurisdiction of the Board and not for shareholders to interfere with. The appellants are in effect highlighting the important rule in company law on the non-overlapping division of powers between directors and shareholders in the administration of companies. The appellants cited art. 118 of the M&A of the respondent to support this established position in law.

[40] I would readily add the more pertinent s. 131B of the Companies Act 1965 which codified this common law rule pursuant to the Companies (Amendments) Act 2007 which had been introduced to enhance the framework on the duties and powers of directors under the law. Section 131B states as follows:

> (1) The business and affairs of a company must be managed by, or under the direction of, the board of directors.
>
> (2) The board of directors has all the powers necessary for managing and for directing and supervising the management of the business and affairs of the company subject to any modification, exception or limitation contained in this Act or in the memorandum or articles of association of the company.

[41] This provision reinforces the principle that the articles divide the powers of the company between the directors and the shareholders, and the latter cannot under the law direct the former on how to exercise the powers properly within the remit of the directors as stipulated in the articles. I need only refer to the passage from the judgment of Lord Wilberforce in delivering the opinion of the Privy Council in the case of *Howard Smith Ltd v. Ampol Petroleum Ltd* [1974] AC 821 which made the point instructively as follows:

> The constitution of a limited company normally provides for directors, with powers of management, and shareholders, with defined voting powers having power to appoint the directors, and to take, in general meeting, by majority vote, decisions on matters not reserved for management ... it is established that directors, within their management powers, may take decisions against the wishes of the majority of shareholders, and indeed that the majority of shareholders cannot control them in the exercise of these powers while they remain in office.

[42] Whilst the position is well established, the appellants' interpretation of the applicability of the rule is manifestly erroneous. It is wrong to state that remuneration of directors, depending on type of payment, is either under the purview of directors or the shareholders. This is a wholly incorrect and glaringly incomplete premise to embark on an analysis of the key points in issue. As stated earlier, the starting position in law must always be the

common law rule that is already firmly and well entrenched in the corpus of the company law in this country that directors have no right to be remunerated unless approved by shareholders by way of a resolution passed at a general meeting or provided for in the articles. In this regard, it should also be observed that the articles that are set out in Table A of the Fourth Schedule to the Companies Act 1965, adopted by many companies provide for the wider term of "remuneration" instead of merely "directors' fees" to be subject to the determination by the shareholders in general meeting. Regulations 70 of Table A states the following:

> The remuneration of the directors shall from time be determined by the company in general meeting. That remuneration shall be deemed to accrue from day to day. The directors may also be paid all travelling, hotel, and other expenses properly incurred by them in attending and returning from meetings of the directors or any committee of the directors or general meetings of the company or in connection with the business of the company.

[43] As such, one can only justify payments by a company to its directors, for whatever purpose, if it is done either on the basis of a shareholder's approval or it being duly authorised by the articles. In the instant case, what is already authorised in the articles is only for claims for expenses for matters done by directors (and surely it must come with proof of receipts) or for some special assignment in the discharge of their duties *qua* director under art. 117. Directors' fees are clearly stated to require shareholders' approval under art. 116. Therefore, other payments such as allowances, in fixed amounts or otherwise, are not for the Board to decide for the obvious and simple reason that they do not have the authority without being conferred or vested with the same. The authority vests in the shareholders who may permit such payments by granting approval for the payments or agree to any amendments to the articles in order to provide for such authority be given to the directors, as an example. Contrary to the appellants' submission, in the division of powers between directors and shareholders, it is clear beyond peradventure that nothing is more clearly within the purview of the shareholders than directors' remuneration since as fiduciaries, it is imperative, as well as it is logical and commonsensical that the directors cannot be vested with the authority to decide on matters pertaining to their own remuneration.

[44] As such, the upshot to the foregoing analysis is my judgment that whilst the finding of the Sessions Court Judge that the "travelling allowances" were for all intents and purposes in truth, a cover for what in reality were payments of directors' fees that ought to have been made only if approved by the shareholders, could be sustained, an alternative, and in my view, a more sound basis which is strongly supported by established principles I discussed earlier, is that payment of travelling allowances, assuming they indeed were so, as described on the vouchers, can at any rate be lawfully made to directors only if approved by the shareholders or

authorised under the articles. As neither, in the instant case, could be shown to be applicable *vis-à-vis* the said "travelling allowances", such payments could not be construed as being other than not valid, and the claim for recovery by the respondent, as the paying company, must therefore succeed.

Summary And Observations

[45] It is important that the essence of the law is properly understood in the practical application of payments of directors' remuneration, the key components of which are fees, allowances and expenses. First, as for directors' fees, it is not uncommon and certainly not unknown that just like the evidence in the instant case reveals that some public listed companies, despite being subject to stricter rules on governance and especially of greater disclosure, design a payment structure that effects payment of directors' fees, on monthly basis, akin to that of salary for employees, and prior to approvals being obtained at AGM. Apart from not truly practising good governance, such payments throughout the year prior to the AGM are thus made without proper authorisation as most M&A as highlighted earlier invariably prescribe the prerequisite of shareholders' approval for any such payments. There is substance to the argument that directors may be infringing their fiduciary duties by sanctioning such arrangement, as it also constitutes a breach of the M&A *sans* any shareholders' approval. What is certain to happen if shareholders do not eventually approve the fees to directors is that like in the instant case, a return to the company of the monies earlier paid to the directors would be absolutely imperative.

[46] A true appreciation of the provisions of the M&A is therefore essential. The risk of having to make a refund (if not breaching the statutory fiduciary duty at the same time), is greatest where the articles stipulate that fees is to be approved by the AGM annually. This should rightfully mean at any payment made prior to AGM approval is in contravention of the M&A. Some Boards try to justify the making of payments in advance of the approval by relying on the shareholding structure where shareholders who constitute the largest block are believed to be supportive of such payment arrangement. Whilst this may provide a certain measure of assurance, strictly the requirement of the law has not been complied with, and additionally the directors risk the possibility of the shareholders who turn up at the general meeting voting against the relevant resolution, thus compelling the return of the monies to the company.

[47] Such an arrangement may however be defensible if there is a provision in M&A, which is not uncommon, which states that there can be no increase in fees unless approved by the shareholders in general meeting. This can legitimately justify the Board securing the prior approval of the shareholders of the remuneration payable per director annually and thus prospectively the amounts would be payable in subsequent years without the need for further approval until and unless there is any proposal to increase the remuneration

sum in future, in which case the new payments may only be effected after approval for the rise be obtained, after which the cycle continues and approval be next sought for when there is a further hike in remuneration. In this arrangement, there is no objection to the directors be paid monthly based on the aggregate annual amount already pre-approved by shareholders for it would be well within the resolution approved earlier.

[48] Secondly, the same treatment applies to other forms of payment as remuneration. This should most usually extend to payments of meeting allowances which is not typically referred to in the M&A. This is separate from directors' fees and in most companies are paid only if the directors attend the relevant Board or Board Committee meetings. It is, like directors' fees, usually a fixed amount but casual references to notices of AGM of listed companies as required to be advertised in major newspapers 21 days prior to AGM date suggests that it is not common for companies to seek their shareholders' approval for payment of meetings allowances. Without the requisite approval, it is clear that directors, as fiduciaries, would be acting contrary to the principle against self-remuneration for as mentioned earlier there is otherwise nothing preventing unscrupulous directors from proposing and agreeing amongst themselves to fix very high meeting allowances to be paid to themselves. Boards and corporate secretaries as their advisers must thus ensure that the amount of meeting allowance be approved by the shareholders before payment. In the likely situation that the provision on no increase without approval *vis a vis* meeting allowance is not similarly found in the articles, it is always open for the company to seek approval at AGMs and for the directors to have the relevant shareholders' resolution on meeting allowance be drafted in a language that makes it clear that such payments are to be made effective from a certain date and that it is to operate in a prospective fashion. Thus such amount of payment, if approval is obtained, can be subsequently validly made, including on monthly basis, and if an increase is proposed, a fresh approval would first be necessary at that future point in time. As such, all forms of payments classified as allowances, often fixed in amount, including what was contended to be "travelling allowances" in the instant case, must similarly adhere to the requirement of prior shareholders' approval.

[49] Thirdly, this must necessarily be distinguished from payments for expenses reasonably incurred by directors related to the discharge of their duties. For this, articles commonly provide for directors to be paid by their companies for such expenses. If so stated, it is not necessary for a separate shareholders' approval be sought for what has already been authorised by the articles. It would thus be a matter to be dealt with by management, and for this purpose, it is only reasonable for governance, as it is logical in practical administration, that claims for expenses can only be entertained if they are supported by documentary evidence such as receipts, invoices and tickets.

[50] It is of interest and most noteworthy that the law on this very subject is proposed to be made stricter as well as much clearer if and when changes to Companies Act 1965 as per the version in the Companies Bill 2015 made available by the Companies Commission of Malaysia on its website for public consultation, are passed and brought into force. Clause 230(1) of the Companies Bill codifies the common law rule and creates a statutory requirement that directors' fees must be approved by shareholders at general meeting. This would mean that in all cases, payments of directors' fees by public companies must be approved by shareholders. This also means that any provisions in the articles of the company authorising payments of fees would no longer be sufficient to validate such payments without additionally securing the approval of shareholders at general meeting (and the Companies Bill also provides that it would no longer be compulsory for companies to have memorandum and articles of association). Moreover, the application of the new statutory rule would not merely be confined to directors' fees, but especially crucially, also extend to "any benefits payable to the directors" which clearly would encompass allowances and other forms of remuneration which should rightfully include even any benefits in kind. This suggests in effect that the details of remuneration of directors presently required to be disclosed in the audited financial statements of listed entities must now be specifically and separately tabled for approval of shareholders of the company at general meeting. An infringement of cl. 230(1) is a criminal offence and payments made in the absence of the requisite shareholders' approval constitute a debt due to the company. For completeness, the said clause, as presently drafted, is as follows:

> Approvals for fees of directors
>
> 230. (1) The fees of the directors, and any benefits payable to the directors including any compensation for loss of employment of a director or former director:
>
> (a) of a public company; or
>
> (b) of a listed company and its subsidiaries, shall be approved at a general meeting.
>
> (2) In the case of a private company, the Board may, subject to the constitution approve the fees of the directors and any benefits payable to the directors including any compensation for loss of employment of a director or former director.
>
> (3) Any approval made under subsection (2) shall be recorded in the minutes of the directors' meeting and the Board shall notify the shareholders of the approval of the fees within fourteen days from the date of the approval.
>
> (4) Where a fee is made or other benefits payable to which subsection (2) applies, members holding at least ten per centum of the total voting rights and who consider that the payment was not fair to the company, within

thirty days after they have knowledge of such payments, may require the company to pass a resolution to approve the payment either by way of a written resolution or at a general meeting.

(5) Unless an approval has been obtained through a resolution passed under subsection (4), the payment shall constitute a debt due by the director to the company.

(6) A company that contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding three million ringgit and any payment in contravention of subsection (1) shall constitute a debt due by the director to the company.

(7) The company and every officer who contravene subsection (3) commit an offence and shall, on conviction, be liable to a fine not exceeding two hundred and fifty thousand ringgit.

Conclusion

[51] For the reasons that I have discussed in this judgment, it is my finding that the respondent had proven its case on a balance of probabilities for the recovery of the payments made by the respondent to the appellants given the failure of the latter to secure the requisite shareholders' approval at general meeting. The decision of the Sessions Court is therefore affirmed and this appeal is accordingly dismissed.